88-1982

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

DOROTHY CAMER for herself and MIKI CAMER; KIRK CAMER; and PEPI CAMER,

Petitioners,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISION I STATE OF WASHINGTON

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QUESTIONS PRESENTED

1. Are students in compulsory attendance at public schools, and their parents, entitled to Fourteenth Amendment Due Process protection against arbitrary denial of the minimum elements of a basic education mandated by state law, regulation, and contract principles?

2. May the state courts refuse to protect students' and parents' federally protected due process liberty and property interests against arbitrary deprivation of a minimum education, on the basis of restrictive state law interpretations of "standing," "res judicata," and the state legislature's failure to create a "private cause of action" for violation of the basic education laws?

LIST OF PARTIES

The parties are the Petitioners: Dorothy Camer, parent; and Kirk Camer, Pepi Camer, and Miki Camer, students; and Respondents: Seattle School District No. 1; William M. Kendrick, Donald J. Steele, Robert L. Nelson, and David L. Moberly, past and current school superintendents; Patt Sutton, John Rasmussen, Richard J. Alexander, Barbara Beuschlein, Michael Preston, T. J. Vassar, Cheryl Bleakness, Suzanne Hittman, Dorothy Hollingsworth, Ellen Roe, Susan Harris, Elizabeth Wales, and Jerry Saulter, past and current school board directors; David Stevens, Charles Trujillo, Ellen Lew, Robert Andrew, Cheryl Chow, Albert Jones, Rachel Gray, Chris Kato, Barbara Herring, Alan Neman, Sonya Watson, Robert Gary, Kenneth Dorsett, Gertrude A. Beamon, Susan Hanson, Jewell Woods, and Shirley Hodgeson, past and current administrative and teaching personnel; and Michael Hoge and Phillip Thompson, school district legal counsel.

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SEATTLE SCHOOL DISTRICT NO. 1, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS, DIVISION I

The petitioners, Dorothy Camer, parent, and Kirk, Pepi, and Miki Camer, students, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Washington State Court of Appeals, Division I, entered in this proceeding on October 10, 1988.

OPINIONS BELOW

The opinion of the Washington State Court of Appeals, dated October 10, 1988, is reported at 762 P.2d 356, 52 Wn. App. 531 (1988) and is reproduced in Appendix A. The order denying reconsideration was filed December 7, 1988. The Petition for Discretionary Review by the Washington State Supreme Court was denied on February 28, 1989. The Order and Mandate are reproduced in Appendix B. The Findings and Conclusions and Order of Dismissal by the trial court are also at Appendix B. The decisions in the two prior related cases are at Appendix C.

JURISDICTION

This Court's jurisdiction is invoked under the U.S. Constitution, Amendment XIV, 42 U.S.C. 1983; and 28 U.S.C. 1257(a), to review a final judgment of the highest court of a state which conflicts with the decisions of this court on important federal constitutional issues.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

The United States Constitution, Fourteenth Amendment; Washington Constitution, Article 9, Section 1. Title 42, United States Code, 1983. Revised Code of Washington, Chapter 28A. Washington Administrative Code, Chapter 180.

Excerpts of State Constitution and Laws are set forth in Appendix D.

STATEMENT OF THE CASE

Petitioners Kirk, Pepi, and Miki Camer were school children, required by law to attend the Seattle,

Washington, Public Schools. They entered the sixth, fifth, and kindergarten grades, respectively, in the Fall of 1978. Kirk and Pepi have now graduated from high school, and Miki has completed 9th grade. Parent Dorothy Camer became aware that the instruction provided in the schools which the children attended did not adhere to the advertised curriculum of the Seattle School District. After examining the Seattle School District's published curriculum, she discovered that essential elements of the curriculum were not taught. She raised her concern with the teaching personnel and administrative staff but received no substantive explanation. While not denying the lack of instruction, they provided no rationale, nor cited any standards which were followed.

She continued to raise her concerns to state officials, e.g. the Superintendent of Public Instruction (SPI), state legislators, senators and representatives, the local mayor and prosecutors. For the most part she received little help except for one state senator who referred her to the state education laws. After studying the law and the record in Seattle School District v. State, 90 Wn.2d 476, 585 P.2d 71 (1978), she brought suit in state court against the State Superintendent of Public Instruction and others, alleging that Kirk and Pepi had failed to achieve certain benchmarks and that they had been denied access to certain courses, in violation of state law and tort principles. She filed the action pro se in 1979 since she lacked the funds for legal counsel, on behalf of herself and the two older children.

The state court case was dismissed and, by an unpublished opinion, subsequently affirmed, on the grounds that (a) no damage action is created by the state Basic Education Act, (b) no common-law tort claim was stated because schools do not have a duty to "insure that every student"..."will be able to achieve every benchmark," and (c) that since Plaintiffs' rights to a basic education under state law "are not disputed by the Defendants"

(App. C-2), that no justiciable controversy would justify a declaratory judgment.

While the appeal was pending in state court, Kirk Camer and Dorothy Camer alone brought a separate suit in federal court under 42 U.S.C. 1983. This suit was also dismissed, and the Ninth Circuit affirmed, holding that no disparate treatment on the basis of a suspect classification had been alleged to support an equal protection claim, that due process does not require notice to Kirk of optional honors classes, and that state law claims should be litigated in state court where they were pending, rather than federal court.

Pepi Camer completed the state history course the following year, without the instruction in the state constitution which is required by state statute as a prerequisite to graduation. When Ms. Camer was dismissed without a hearing both in the state and federal courts, she decided that she needed more evidence of the denial of instruction. She requested documents from the School District to support her complaints. When the school district denied her requests for access to documents, Ms. Camer filed suit under the State public disclosure act, and finally won in 1985. (Aff'd, Camer v. Stevens, 50 Wn.App. 1018 (1987)). She discovered numerous failures by defendants to meet the minimum requirements for a basic education, in violation of state law, regulations, and advertised promises.

In 1986, just before this action commenced, Miki Camer was scheduled to take the state history course. Ms. Camer hoped to ensure that Miki would receive the legally mandated instruction in the state constitution which had been arbitrarily denied her brother and sister. Ms. Camer again raised the issue to school administrators, the school board, Superintendent of Public Instruction, and Attorney General, with no success. A letter from the school superintendent acknowledged that the state constitution should be covered in the 8th grade state

history course but declined to provide any assurance that it would be. Letters from both the school district legal counsel and the president of the school board admitted that due process hearings are limited to disciplinary and special education issues, and that no administrative procedure is provided by defendants for handling instructional grievances. Miki has since completed the course under Defendant Jewell Woods without receiving the instruction in the state constitution. She was also denied the full hours of instruction required by state law (RCW 28A.58.754). Miki has not been a party to, or subject of, any prior lawsuit.

Invoking 42 U.S.C. 1983, Petitioners brought action in King County Superior Court for injunctive and declaratory relief and damages under the state basic education laws, and the Due Process Clause of the Fourteenth Amendment. The Complaint alleged denial by the Respondents of the minimum basic education mandated by state laws and regulations, including, for example, the requirements for a minimum of six hours of instruction 180 days per year (required by RCW 28A.58.754(2 and 5) and 28A.58.758(2)(c)); elements of the math and language arts curricula (promulgated under RCW 28A.58.090 and 28A.05.010); and instruction in the state constitution (required by RCW 28A.02.080; 28A.05.050).

Kirk and Pepi Camer were permitted to graduate from the Seattle Schools with above average grades without the minimum basic education defined by the state laws (RCW 28A.58.750 through .754) and regulations (WAC 180-16 and -50) and in particular without the minimum requirements for graduation, such as the state constitution and elements of the language arts curriculum, and without the annual evaluation required by RCW 28A.58.090. The Complaint further stated that these arbitrary denials of education deprived Plaintiffs of liberty and property without due process of law, and were in

violation of the civil rights of the students under 42 U.S.C. 1983.

Respondents/Defendants neither denied the deprivation of instruction nor provided any explanation as to why it was lacking. Instead their defense was that even if the basic education had been denied, state law did not provide a private cause of action to students thus injured, that loss of education was not an injury, that defendants were immune under state law, and numerous technical defenses. The Superior Court dismissed the action on March 18, 1987. An appeal was filed with the state Supreme Court which remanded it to the state Court of Appeals, which affirmed the Superior Court decision.

The federal questions were timely and properly raised in the complaint, at 5-6; the Amended Complaint, 2-3, the Brief of Appellant at 27-29, the Reply Brief of Appellant, at 19, 22, the Petition for Review, at 8-9; the Reply of Petitioner, at 10. The trial court rejected the federal claims at App. B-3, and the Court of Appeals affirmed at A-7: "The Camers do not state a claim under...the United States Constitution...Nor do the Camers...have...standing to bring an action for violation of constitutional provisions."

The Court of Appeals held that the legislature did not intend to create a judicial remedy under state law for denials of the specified basic education required to be provided to all students. It was held that this action was similar to those previously brought by Mrs. Camer for her older children against different parties based on different facts, so that "res judicata" should bar even the claim of Miki Camer, who had been involved in no prior action. Finally, and without explanation, the court found plaintiffs to have claimed insufficient injury to have "standing" to complain of violation of their constitutional rights.

A petition for discretionary review of the appellate court decision was filed and was denied by the Washington Supreme Court on February 28, 1989. We

now seek certiorari to review the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. *The Fourteenth Amendment Protects Against Arbitrary Denial of the Legitimate Entitlement to Basic Education Which is Explicitly Guaranteed and Defined by State Law.*

Our public schools have failed to adequately educate millions of students in the minimal skills needed to function in the social, economic, and political systems. As a result, "our nation is at risk." National Commission on Excellence in Education, A Nation at Risk: The Imperative for Educational Reform (1983).

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditure for education both demonstrate our recognition of the importance of an education to our democratic society. It is required in the performance of our most basic public responsibilities....it is the very foundation of good citizenship. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all....

Brown v. Board of Education, 347 U.S. 483, 493 (1954).

Plaintiff Dorothy Camer has, like many other parents, been deeply concerned about the quality of education in our public schools. Many proposals have been made for changing our schools--defining new goals or methods to achieve them. But before such changes are prescribed, a more fundamental question is whether the schools are performing their existing specific legal duties. If they are

out of control, and administrators are not held responsible for following their specific existing legal obligations, what good will it do to give them new ones?

When in a person is in custody of the state, she is entitled to attention to her medical needs. Estelle v. Gamble, 429 U.S. 97 (1976) ("deliberate indifference" to medical needs of convicted prisoners a violation of 1983"). In Matzker v. Herr, 745 F.2d 1142 (7th Cir. 1984), the court held that a pre-trial detainee's due process right to be free from punishment is violated when a jailor fails "properly and reasonably to procure competent medical aid" for illness or injury. Thus, while the Eighth Amendment does not protect pre-trial detainees, or school children, the Due Process rights of an arrestee "are at least as great as the Eighth Amendment protections available to a convicted prisoner." City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983). And "persons who have been involuntarily committed are entitled to more considerate treatment...than criminals...Cf. Estelle." Youngberg, 457 U.S. 310, 322-323 (1982).

It has been held that a child in custody of the state, states a cause of action under 1983 when state officials are deliberately indifferent to or act in reckless disregard of her welfare. Taylor v. Ledbetter, 818 F.2d 881 (11th Cir. 1987) (en banc). It was held there that the Georgia statutory scheme creates a legitimate entitlement to certain care, enforceable in federal court. The special relationship between plaintiff children and the agency employees and officials required by law to provide them with certain services "is an important one involving substantial duties and, therefore, substantial rights." Id., at 798. Under Washington law, the Camer children were required to attend school. RCW 28A. App. D--(fine and/or jail for violation of compulsory education statute). "Because students are placed in school at the command of the state and are not free to decline to atttend, students

are in what may be viewed as functionall custody of the school authorities...." Stoneking v. bradford Area School District, 856 F.2d 594 (3rd Cir. 1988). Compare De Shaney v. Winnebago County, No. 87-54, 57 L.W. 4218 (Feb. 22, 1989) at 4219, n.2 (No claim of entitlement made below, no state custody, harm caused by third part).

This Court has held, in the context of mental institutions, that when the state exercises its power to deprive persons of liberty, a reciprocal right is created to the provision of the services for which the restraint on liberty is justified. See O'Connor v. Donaldson, 422 U.S. 563 (1975) (no confinement without treatment); Youngberg v. Romeo, 457 U.S. 307 (1982) (constitutional right to adequate care); cf. (right to treatment); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (minimum standards of treatment). In Youngberg, supra, the Court found one committed to the custody of the state for care and treatment has a constitutional right to "such conditions of confinement [as] would comport fully with the purpose of respondent's commitment." 457 U.S. at 324. The plaintiff in Youngberg was found entitled to put on expert testimony as to whether the hospital officials' decisions "were a substantial departure from the requisite professional judgment." Id., at n.31.

Minimum standards of education for those in compulsory custody of educational institutions are at least as important. In Brown v. Board of Education, 347 U.S. 483 (1954), this Court expressed the doubt "that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Id. at 493. "Education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." Plyler v. Doe, 457 U.S. 202, 221 (1982). Some minimum "degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and

independence." Wisconsin v. Yoder, 406 U.S. 205, 221 (1972). This Court also acknowledged the fundamental rights of parents that are impacted by compulsory schooling, and thus the gravity of the state's responsibilities. Id. at 232.

Yet thousands of students attend schools that fail to enable students to master even basic skills. National Commission, supra. See also U.S. Department of Education, "The Nation Responds" (May 1984); Ratner, "A New Legal Duty for Urban Public Schools: Effective Education and Basic Skills," 63 Tex. L. Rev. 787 (1985).

The recognition of this crisis has led to a nationwide educational reform movement, as state commissions and legislatures have proposed and enacted numerous reform initiatives. A principal product of this movement has been the enunciation of minimum legal standards for basic education, creating substantive rights as defined under state law. See Chambers, Adequate Education for All: A Right, An Achievable Goal, 22 Harvard Civil Rights-Civil Liberties Law Rev. 55, 61 (1987)("These standards present us with an opportunity to define a right to a minimally adequate education.") Standards are essential to monitor performance of school teachers and administrators, as well as that of students. A majority of states have now enacted minimum criteria for evaluating and judging the education actually provided to students. See "Changing Course--A 50-State Survey of Reform Measures," Educ. Week 11 (Feb. 6, 1985); Kirp & Yudof, Educational Policy and the Law (2d Ed. 1982).

The definition of the precise content of a basic minimum education is an ongoing process. It has been pointed out that the right to an adequate education is rooted in the meaningful exercise of the freedom of expression and the right to participate in state elections on an equal basis with other voters, and basic minimal skills are necessary for the enjoyment of these rights. San

Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

In San Antonio v. Rodriquez, 411 U.S. 1 (1973), "only relative differences..." in education were challenged. There was "no charge...that the system fails to provide each child with an opportunity to acquire the basic minimum skills..." Id. at 36. The issue here is precisely the denial of the absolute minimum of education which the Seattle School District has defined (in compliance with the requirement of state law, RCW 58A.58.090) to be mandated to be provided to all students. This is the "identifiable quantum of education (which) is a constitutionally protected prerequisite to the meaningful exercise of either (the right to speak or the right to vote)" that this Court indicated in San Antonio v. Rodriquez would merit the court's protection.

Then, in Goss v. Lopez, 419 U.S. 565 (1975) the Court found the Fourteenth Amendment to be violated by arbitrary deprivation of education to which a student is entitled under state law. It rejected the contention "that because there is no constitutional right to an education at public expense, the Due Process Clause does not protect" students. Id. at 572. The Court found rather that "on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. [State statutes] direct local authorities to provide a free education to all residents between five and twenty-one years of age, and a compulsory attendance law requires attendance for a school year of not less than 32 weeks." Id. at 573.

> Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and it has required its children to attend. Those young people do not 'shed their constitutional rights' at the schoolhouse door. Tinker v. Des Moines School District, 393 U.S. 503, 506 (1969). 'The Fourteenth Amendment as now applied to the

> states, protects the citizen against the state itself and all of its creatures--boards of education not excepted.' West Virginia Board of Education v. Barnette, 319 U.S. 624, 637 (1943). The authority possessed by the state...though concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the state is constrained to recognize a student's legitimate interest to a public education as a property interest which is protected by the Due Process Clause...The Due Process Clause also forbids arbitrary deprivations of liberty.

Id. at 574. The Court therefore held that loss of even a few days of education triggered the protections of the Due Process Clause against arbitrary deprivations of liberty and property. Implicit in the recognition of such entitlements is the requirement that they may not be infringed except for "cause." Id., at 587, n.4 (Powell, dissenting).

And under Washington law, the legally required curriculum is not discretionary with the school districts or teachers, who have no authority to "ignore or omit essential course material or disregard the course calendar." Millikan v. Board of Directors of Everett School District, 93 Wn.2d 522, 611 P.2d 414 (1980). Compare Kentucky Department of Corrections v. Thompson, 57 L.W. 4531, 4534 (May 15, 1989) ("explicitly mandatory language...forces a conclusion that the state has created a liberty interest....The regulations here, however, lack the requisite relevant mandatory language.") The violation of legitimate expectations and entitlements in this case all arise from unequivocally mandatory language. See Statement, supra, at 4-5. (RCW 28A.05: "compulsory courses"; RCW 28.02.080: "study of constitutions compulsory"; RCW 28A.58.754: "program requirements"; RCW 28A.58.090: "study learning objectives...shall be locally assessed annually."

RCW 28A.27.020: "compulsory school attendance--school's duties upon juvenile's failure to attend.")

Here, the intentional actions of defendants deprived plaintiffs of essential elements of a basic minimum education, over a number of years, without any cause or justification. What is alleged is the arbitrary exercise of governmental power, not mere negligence. Cf. Daniels v. Williams, 106 S.Ct. 662 (1986); Davidson v. Cannon, 106 S.Ct. 668 (1986).

Certiorari should be granted to clarify and establish the important federal Due Process right to receive at least the minimum prescribed educational program for which school children are taken from their parents and put in the custody of the schools.

2. The Washington State Courts Have Failed to Recognize the Plaintiff School Childrens' Federally Protected Rights.

The Supremacy Clause of the United States Constitution compels state courts to hear and decide 1983 cases submitted to them. Cf. Testa v. Katt, 330 U.S. 386 (1947). State courts determining 1983 claims submitted to them must apply the relevant substantive federal rules, not state law. C. Wright, Law of Federal Courts 271-73 (4th Ed. 1983). See Maine v. Thibotout, 448 U.S. 1, 10 n.11 (1980). As a corollary, in Martinez v. California, 444 U.S. 277 (1980);, the Court clearly stated that:

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. 1983...cannot be immunized by state law. The construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the Supremacy Clause of the Constitution insures that the proper construction

> may be enforced....The immunity claim raises a question of federal law.

Id. at 284 n.8 (quoting Hampton v. City of Chicago, 484 F.2d 602, 607 (7th Cir. 1973) (refusing to apply Illinois immunity law in a 1983 action), cert. denied, 415 U.S. 917 (1974)).

Unfortunately, many civil rights plaintiffs are handicapped in state court by antipathy towards, and lack of competence in connection with, such claims on the part of state courts. See Neuborne, "The Myth of Parity," 90 Harv. L. Rev. 1105 (1977). This may be particularly true when a case is brought by a so-called unpopular plaintiff or raises controversial and politically sensitive matters, or both. Nahmod, Civil Rights And Civil Liberties Litigation, The Law Of 1983 (2nd Edition), at 1.13.

In Monroe v. Pape, 365 U.S. 167 (1961), this Court recognized that one of the reasons 1983 was enacted, was the lack of enforcement in the states of Fourteenth Amendment rights "by reason of prejudice, passion, neglect, intolerance, or otherwise." Id., at 180.

In this case, plaintiffs received short shrift from the state courts, which barely mentioned their federal claims. Neither of the two primary grounds for dismissal under state law justified disregard of the federal wrongs complained of.

First, the determination that the state legislature did not intend to create a "private cause of action" for violations of the State's Basic Education Act cannot immunize the responsible state employees. Martinez, supra. Just as the legislature cannot abridge constitutional rights by its enactments, it cannot curtail mandatory provisions by its silence. See Seattle School District v. State, 90 Wn.2d 476, at 503 n. 7, 585 P.2d 71 (1978), citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). The explicit purpose of 1983 is to create a "private cause of action," and "the Supremacy Clause imposes on state courts a constitutional duty to proceed in

such a manner that all the substantial rights of the parties under controlling federal law are protected." Felder v. Casey, 487 U.S. __, 101 L.Ed.2d 123, 146 (1988). In Goss v. Lopez, 419 U.S. 565 (1964), this Court rejected the argument that state law discretion granted to school principals limited the due process rights of school students. Once the entitlement is created by state law, the federal constitution limits the circumstances under which it can be taken away. This principle was disregarded by the state court in limiting 1983 causes of action to those in which the state legislature has created a "private right of action."

Likewise, the second principal holding, that these claims are barred by res judicata under state law, conflicts with federal principles of res judicata. In Allen v. McCrary, 449 U.S. 90, 95 n.7 (1980), this Court held that the Full Faith and Credit Statute requires federal courts to apply state issue preclusion rules in 1983 actions only when the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issues actually decided in a prior state court proceeding. In Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984), it was held that the same principles apply to claim preclusion. Id. at 84. Cf. University of Tennessee v. Elliot, __ U.S. __, 106 S.Ct. 3220, 3227 (1986); Gjellum v. City of Birmingham, Ala., 829 F.2d 1056, 1063 (11th Cir. 1987).

In Allen, the Court said that "other factors, of course, may require an exception to the normal rules of collateral estoppel in particular cases." Id. at 95 n. 7. Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) held: "The state must, however, satisfy the applicable requirements of the Due Process Clause. A state may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." Kremer, supra, 456 U.S. at 482. Thus, "even

when issues...are preclusive under state law, redetermination of [the] issues [may nevertheless be] warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." Haring v. Prosise, 462 U.S. 306 (1983) at 317-18. (1983) claim not barred by state preclusion rule for failure to raise in prior litigation.) Here, the Camers were barred on the theory they "could have discovered" the violations earlier (but see Statement at 5, supra).. An examination of the prior opinions in the appendix clearly reveals that this is a case where the state court was "unwilling or unable to protect federal rights." Haring, 462 U.S. at 314, citing cases.

It would obviously violate due process to bind Miki Camer with the results of prior litigation to which she was not party, and at which none of the facts or claims she raises here were at issue. The fact that her mother was a prior litigant of similar claims, and also appears in a representative capacity here, cannot justify visiting the sins of the parents upon the children. The requirements for a finding of privity are clearly absent. See Moore's Federal Practice 0.411:

> Nor should the interest of beneficiary C, whom F represents by virtue of a separate fiduciary relationship, be at stake when F litigates as representative of B. This is the rationale supporting the rule as to different capacities. And it has been adopted by the Restatement. (Restatement of Judgments (1942) 80b.")

A third major conflict with applicable federal principles appears in the holding of the state Court of Appeals that insufficient injury or damage is claimed for plaintiffs to have "standing to bring a cause of action for violation of constitutional provisions." Appendix A-13. This is in direct conflict with Carey v. Piphus, 435 U.S. 247 (1978), a case brought against school board members for violation of due process rights, in which the Court held

that a cause of action is stated even in the absence of evidence of actual injury, justifying an award of at least nominal damages. Declaratory and injunctive relief, as well as attorney's fees, would likewise be expected to follow. While the Court in Carey held that damages are not to be "presumed," the Court pointed out the difference between presumed damages and inferred damages. 435 U.S. at 264, n. 22. ("The Court's comment in Seaton, that 'humiliation can be inferred from the circumstances as well as established by the testimony,' 491 F.2d, at 636, suggests that the Court considered the question of actual injury to be one of fact.") Numerous cases are then cited upholding such "inferred damage" awards. Id. And, of course, on a motion for summary dismissal, as is in this case, a motion may not be granted where the moving party's submissions had not foreclosed the possibility of the existence of certain facts from which 'it would be open to a jury...to infer from the circumstances'" that the elements of the claim had been established." Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986), quoting Adickes v. Kress, 398 U.S. 144, 158 (1970).

As the Court concluded in Carey: "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed." 435 U.S. at 266.

The failure of the state courts in this case to observe these rights, or to recognize and follow controlling federal law, is a serious threat to the Supremacy Clause and the continuing vitality of 42 United States Code 1983 as a minimum safeguard for individual rights. If allowed to stand, the decision below will leave low level school administrators and officials free to arbitrarily deny essential elements of education for any reason whatsoever, or for no reason at all. The political efforts leading to legislative reform mean nothing if the judiciary

leaves the executive free to ignore the law at its whim or fancy. The promised benefits that justify compulsory education, and the Due Process clause itself, become "a teasing illusion, like a munificent bequest in a pauper's will." Edwards v. California, 314 U.S. 160, 186 (1941).

CONCLUSION

Certiorari should be granted to remedy the important conflicts with controlling decisions of this Court.

Date: May 25, 1989.

Respectfully Submitted,

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APPENDIX A

DECISION
OF THE COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

Dorothy Camer,for herself and Miki Camer;Kirk Camer; and Pepi Camer,Appellants v. Seattle School District No.1, et al.,Respondents

No. 21269-9-I
52 Wn.App. 531, 762 P.2d 356 (1988)
Filed October 10, 1988

Scholfield, C. J. -- Dorothy Camer and her three children appeal the superior court judgment dismissing their claims against the Seattle School District and numerous named individuals. We affirm.

FACTS

On June 30,1986, Dorothy Camer and her three children brought an action for declaratory judgment against the Seattle School District and numerous named individuals. By their complaint, the Camers sought a declaratory judgment to test the adequacy of the conduct of school district personnel with relation to their responsibilities under Washington's Basic Education Act. The complaint alleged the violation of specific statutes, including the failure of the Seattle Public Schools to teach the state constitution, lack of an adequate process for resolving grievances, failure to develop student learning assessments, use of arbitrary procedures for discipline, failure to provide an optimum learning atmosphere, failure of the principals to supervise the educational program, failure to provide the designated instruction, failure of the school directors to enforce the laws, squandering of public funds, fraud and conspiracy, failure of the District to provide for the safety and welfare of students and failure of the District to

provide a uniform school system. By amendment to the complaint filed September 23,1986, another defendant, Jewell Woods, was added.

In April 1980, Dorothy Camer brought a suit against the District,the Superintendent of Public Instruction (SPI), and a number of District personnel (many of whom are named as defendants in the present suit) on behalf of her two children. Camer v. Brouillet, (King County Cause No. 80-2-05307-8), aff'd, 31 Wn. App. 1097, review denied, 97 Wn. 2d 1042 (1982). She objected to the fashion in which the District had implemented the student learning objectives (SLO's) law, RCW 28A.58.090, and the Washington Basic Education Act of 1977,RCW 28A.58.750. Mrs.Camer asserted that both children had been denied adequate instruction, that her children's schools had failed to provide a "healthy environment conducive to education" and a program to meet the "individual and collective needs of the plaintiffs and their fellow students," and that the children had been denied their right to a basic education under the Washington Constitution, article 9, section 1. She further asserted her frustration with available administrative processes. She sought damages and a declaratory judgment on basic education as defined by the SLOs, and prayed for relief based on RCW 28A.58.750 et seq. Summary judgment was granted against Mrs.Camer. The judgment was affirmed by the Court of Appeals, which denied Mrs.Camer's claim for a declaratory judgment on the ground no justiciable controversy was present. The court also held she had no standing to bring a private cause of action under the SLOs, and that she had no standing to sue for educational malpractice. The Supreme Court denied review.

Mrs. Camer brought a similar suit in federal court, including among the defendants the Attorney General, the King County Prosecuting Attorney, the SPI, and other school officials. Camer v. Eikenberry, U. S. Dist. Ct. Cause No. C81-682M (W.D. Wash. 1982), aff'd, 703 F.2d 574 (9th Cir. 1983), cert. denied, 464 U.S. 828 (1983). In the federal

action, Mrs. Camer alleged that her son Kirk had been denied equal access to programs offered by the District and had been denied instruction in various elements of the published curriculum necessary to attain the SLOs for his grade, including those related to Washington State government. The United States District Court dismissed the case, and the dismissal was affirmed by the Ninth Circuit in an unpublished opinion. The United States Supreme Court denied certiorari.

On December 15, 1986, the trial court entered an order of dismissal and summary judgment dismissing all of the Camers' claims in the present action, but reserving to the Camers the opportunity to replead their claims of fraud and conspiracy within 30 days. The trial court granted attorney's fees to defendants on the ground that a number of the Camers' allegations and claims were frivolous and specifically found that the Camers second amended complaint seeking to add Jewell Woods as a defendant was frivolous on its face.

On January 14, 1987, the Camers repleaded their claims of fraud and conspiracy. On March 18, 1987, the court filed an order of dismissal and summary judgment regarding the fraud and conspiracy claims. This appeal timely followed. The Camers first sought direct review from the Washington Supreme Court, which was denied.

RES JUDICATA

Res judicata ensures the finality of decisions. A final judgment on the merits bars parties or their privies from relitigating issues that were or could have been raised in that action. Mellor v. Chamberlin, 100 Wn 2nd, 643, 645, 673 P.2d 610 (1983). The rule is stated as follows:

> In Washington res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be

> identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.

Mellor v. Chamberlin, supra at 645.

In applying these criteria to the facts at bar, we find that this case is barred by the doctrine of res judicata. The present case and Camer v. Brouillet, supra are so substantially similar that there is no clear basis for distinguishing them. First, in both cases the subject matter pertains to the adequacy of the manner in which school administrators are implementing the constitutional and statutory directives regarding education. Secondly, although the cause of action is not phrased in identical terms, in both cases the plaintiffs essentially argued the same issue--that the school district and administrators are not following statutory and constitutional requirements regarding curriculum and administration. The same statutes and constitutional provisions are relied upon in both cases. Furthermore, their claim that the Washington State Constitution was not taught could have been raised in a prior lawsuit, even though no Camer child had yet graduated, because at the time of the suit they could have discovered whether teaching the state constitution was in the curriculum. Third, although an additional Camer child is a plaintiff in the present action, we hold that the persons and parties are essentially the same. Counsel for Camer claims that res judicata does not apply because Miki, a 13-year-old child named as plaintiff in this case, was not involved in any of the previous cases. However, the quality of the plaintiff is the same in both cases. See Rains v. State, 100 Wn.2d 660, 664, 674 P.2d 165 (1983). If we adopted the Camers' reasoning on this issue, each time another Camer child entered the Seattle school system, they would have the right to bring exactly the same complaint and have it heard through the judicial system. Finally, the persons against whom the claim is made, the District, administrators, and teachers are qualitatively the same parties for

purposes of applying the doctrine of res judicata. See Rains v. State, supra. The Camers may not now relitigate issues that were or could have been raised in the prior actions.

PRIVATE CAUSE OF ACTION

The next issue before us is whether RCW 28A.02.080 and RCW 28A.05.050 create a judicially enforceable duty, on the part of local school districts, to teach the state constitution to public school students. We find that the Camers have not shown that a private right of action exists.

RCW 28A.02.080 provides in relevant part that the study of the Constitution of the State of Washington shall be a condition prerequisite to graduation from the public and private high schools of this state. RCW 28A.05.050 requires the State Board of Education to prescribe a 1-year course of study in the history and government of the United States, and the equivalent of a 1-semester course of the study of the State of Washington's history and government. Accordingly, WAC 180-50-120 and -130 were adopted, which require all schools to provide a 1-semester high school level course in Washington history and government, including "a study of the Washington state Constitution", WAC 180-50-120(2), and a similar 1-year course in United States history and government. The Camers argue that the Seattle School District does not comply with these requirements.

In Cort v. Ash, 422 U.S. 66, 78, 45 L.ED. 2d 266, 95 S. Ct 2080 (1975), the Court adopted the following test for determining whether a private remedy is implicit in a statute not expressly providing one:

> In determining whether a private remedy is implicit in a stature not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . .

> Second, is thee any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? (Citations omitted.)

Assuming for the sake of argument that the Camers are within the class for whose especial benefit the statute was enacted, the language of the statutes cited by Camer is devoid of any expression or indication of an intent on the part of the Legislature to create a private cause of action for damages. Nor has Camer cited legislative history showing such a legislative intent.

Generally, the statutory scheme indicates to the contrary. RCW 28A.58.090 provides for periodic reviews of curriculum and the SLOs by school district boards of directors, the SPI, and the State Board of Education. These matters are, by practical necessity, largely discretionary with those charged with the responsibilities of school administration. Courts and judges are normally not in a position to substitute their judgment for that of school authorities, Millikan v. Board of Directors, 93 Wn.2d 522, 611 P.2d 414 (1980), nor are we equipped to oversee and monitor day-to-day operations of a school system.

Moreover, implying a private cause of action would not be consistent with the purposes of a legislative scheme, which seeks to set up general guidelines for producing an ample education for Washington state citizens as mandated by Const., art. 9, section 1, to be administered within the discretion of the school board and its officers. The legislature has limited judicial review to designated persons aggrieved "by any decision or order of any school official or board . . ." RCW 28A.88.010.

The present administrative setup involving the Board of Education and the Superintendent of Public Education, provides a proper chain of accountability for education and is adequate to address the problems. Finally, the Legislature can impose sanctions against the district that fails to comply in the discharge of its duties by withholding its funding. WAC 180-16-195(3).

The Camers' allegations do not state a cause of action arising under either the Washington or the United States Constitutions. Const. art. 9, section 1 imposes a judicially enforceable affirmative duty on the State to make ample provision for the education of children. Seattle School Dist. 1 v. State, 90 Wn.2d 476, 585 P.2d 71 (1978). The Camers do not allege facts which constitute a violation of this provision. Nor do the Camers show actual damage or injury, and therefore, they have no standing to bring a cause of action for violation of constitutional provisions. See Seattle School Dist. 1 v. State, supra at 494.

The Camers also make additional assignments of error. First, the Camers assign error to the trial court's finding that most of the actions or inactions alleged by the Camers fall within the broad discretionary authority of the Seattle School District, its administrators, and its certified staff, all of whom are public officers and therefore are immune from liability for such decisions. Next, the Camers assign error to the trial courts's finding that the Camers did not make proper service on any of the individuals defendants except Kenneth Dorsett, Michael Hoge, William Kendrick, Chris Kato, David Stevens, Jewell Woods and Elizabeth Wales. The Camers also assert that the trial court erred in finding that their claims against the individual defendants were barred by the statute of limitations. Finally, the Camers argue that the trial court erred in finding that the Camers failed to state a claim for fraud and in finding that the Camers cannot recover for educational malpractice.

It serves no purpose to discuss these assignments individually, when all of them are disposed of by our holding that this action is barred by res judicata and that there is no private cause of action for the complaints that the Camers make in this case.

FRIVOLOUS CLAIM AS TO JEWELL WOODS

The Camers also argue that their claim as to Jewell Woods was not frivolous and that an award of attorney's fees is unauthorized prior to litigation.

Former RCW 4.84.185 states in pertinent part:

> In any civil action, the court having jurisdiction may, upon final judgment and written findings by the trial judge that the action . . . was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action . . .

The Camers cite Whetstone v. Olson, 46 Wn App 308, 732 P.2d 159 (1986) as support for their argument that attorney's fees may not be awarded under RCW 4.84.185 for defending a frivolous action when the case is dismissed prior to the plaintiffs' presentation of their entire case. However, RCW 4.84.185 was amended in 1987 to include orders on summary judgment.

Statutes generally operate prospectively unless remedial in nature. A statute is remedial when it relates to practice, procedure or remedies and does not affect a substantive or vested right. Miebach v. Colasurdo, 102 Wn.2d 170, 180-181, 685 P.2d 1074 (1984). We deem attorney's fees to be remedial in nature and therefore give the statute retroactive effect.

In the present case, the amended complaint adding Jewell Woods as a defendant alleged that Woods arrived late to an appointment with Mrs. Camer and refused to allow Mrs. Camer to copy her lesson plans, which contained no material covering the constitution. These facts do not state a cause of action that can be supported by any rational argument on the law or facts. Therefore, we find that the trial court did not abuse its discretion in awarding attorney's fees to Woods.

FRIVOLOUS APPEAL

RAP 18.9(a) authorizes the appellate court, on its own initiative, to order sanctions against a party who brings an appeal for the purpose of delay. Sanctions may include, as compensatory damages,an award of attorney's fees to the opposing party. See RAP 18.9, Comment, 86 Wn.2d 1272 (1976); Bill of Rights Legal Found. v. Evergreen State College, 44 Wn App. 690,723 P.2d 483 (1986). In determining whether an appeal is brought for delay under RAP 18.9(a), "our primary inquiry is whether, when considering the record as a whole, the appeal is frivolous,i.e., whether it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal." Streater v. White,26 Wn.App.430, 434, 613 P.2d 187 (1980). All doubts as to whether an appeal is frivolous should be resolved in favor of the appellant. Streater v. White, supra at 435.

In applying these criteria, we find that this appeal is frivolous. This case presents essentially the same claims and issues on which the Camers were defeated in two prior cases. Nevertheless, the Camers have persisted in appealing this case even though they present no debatable issues and their position is so devoid of merit that there is no possibility of reversal.

Judgment affirmed.

ORDER

OF THE SUPREME COURT OF WASHINGTON

Camer, et al, Petitioners, v. Seattle School District 1, et al, Respondents, No. 55807-8. Petition for review of a decision of the Court of Appeals, Oct. 10, 1988, 52 Wn App 531. Denied Feb. 28, 1989.

MANDATE OF THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

No. 21269-9-I Camer v. Seattle School

The State of Washington to: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on October 10, 1988 became the decision terminating review of this court in the above entitled case on March 17, 1989. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Mandate after opinion is filed. Petition for review denied on February 28, 1989. Order denying motion for reconsideration entered on December 7, 1989. Pursuant to a commissioner's ruling entered on Novermber 2, 1988, it is ordered that costs in the amount of Five hundred Thirty-Two and 17/100 ($532.17) shall be taxed against appellants Camer in favor respondent Seattle School District No. 1; no costs awarded to respondent Sonia Watson.

APPENDIX B

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

Dorothy Camer,for herself and Miki Camer; Kirk Camer; and Pepi Camer, Plaintiffs v. Seattle School District No.1 et al., Defendants
No. 86-2-11966-3

ORDER OF DISMISSAL AND SUMMARY JUDGMENT

THIS MATTER, having come on for hearing before the undersigned Judge Gerard M. Shellan on November 13,, 1986, on motions of defendant Seattle School District No. 1 and other served defendants for dismissal or summary judgment, for dismissal of claims against individual defendants, and for dismissal of claims of fraud and conspiracy; and, on December 15, 1986, on further motion of defendants for attorneys' fees and terms; defendants having been represented at the hearings on said motions by Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax, P.S. and Lawrence B. Ransom, and Brown-Mathews and Jackie R. Brown,, their attorneys; plaintiffs appearing at said hearing through plaintiff Dorothy Camer, pro se; the court having heard the arguments of counsel and the pro se plaintiffs; and the court having reviewed and considered the following:

Plaintiffs' petition for declaratory judgment, violation of civil rights and other relief; Plaintiffs' amended summons; Plaintiffs' second amendment to complaint; Affidavits of service submitted by plaintiffs; defendants' motion to dismiss claims against individual defendants, together with attachments which included alleged affidavits of service; sworn statement by Michael Hoge in support of defendants' motion for dismissal or for summary judgment; defendants' memorandum in support of motion for

dismissal or summary judgment, together with attachments A to K, which include prior litigation,, court orders and correspondence; defendants' reply memorandum in support of motion for summary judgment; defendants' supplemental memorandum in support of motion to dismiss claims against individual defendants; 'supplemental memorandum in support of motion to dismiss fraud and conspiracy claims, together with Exhibit A attached to it, which is a letter; plaintiff's memorandum opposing dismissal of individual defendants; affidavit of Joan Marie White; plaintiff's memorandum opposing dismissal of fraud and conspiracy charges, to which is attached the transcript of an oral decision of the superior court arising out of the 1982 cause, Camer v. Stevens; affidavit of the plaintiff regarding when she realized defendants' activities constituted a fraud; plaintiffs' memorandum opposing dismissal or summary judgment, with attachment which includes a copy of a judgment arising under the 1982 cause, Camer v. Stevens; affidavit of the plaintiff opposing summary judgment; affidavit of Kirk Camer; affidavit of Miki Camer, with attachments; affidavit of L. Christine Foss; affidavit of Rochelle V. Leopard, with attachments and correspondence; affidavit of Barbara E. Robertson, with attachments; affidavit of Patricia L. Turner, with attachment, including letters from Group Health and certain exhibits; affidavit of Karimu White; affidavit of Malika M. White; affidavit of Nancy A. Winston, with attachments; corrections to plaintiff's memoranda opposing defendant's motion to dismiss for various reasons, together with attachments; affidavit of Pepi Camer, with attachments; supplement to memorandum opposing defendants' motion to dismiss for various reasons, together with a second affidavit of the plaintiff to support memoranda opposing dismissal; and all other papers properly filed by any party to these proceedings; and the court being otherwise fully advised; now therefore,

The court does make the following FINDINGS AND CONCLUSIONS:

1. Many of the issues raised by plaintiffs in this case are the same or similar to those that were raised in previous cases brought by the same plaintiff: Camer v. Brouillet, King County Cause No. 80-2-05307-8, (Oct. 8, 1980),, aff'd by unpublished opinion, 21 Wn. App. 1097 (1982), and Camer v. Eikenberry, United States District Court Cause No. C81-682M. (W.D. Wash. 1982), aff'd by unpublished opinion, 703 F.2d 574 (9th Cir. 1983), cert denied, 464 U.S. 828, 104 S.Ct. 102,, 78 L.Ed. 2d 106 (1983).

2. Plaintiffs' allegation of fraud and conspiracy have not been pleaded with the particularity required under Civil Rule 9(b).

3. Plaintiffs' allegations, and the record before this court, do not contain any showing of damages to any plaintiff or any of the plaintiff's children.

4. Plaintiffs' allegations do not state an individual private cause of action for educational malpractice, and Washington courts do not in any event recognize an individual cause of action for educational malpractice.

5. Plaintiffs' allegations do not state a private cause of action under Chapter 28A RCW in general,, under Washington's Basic Education Act in particular, or under any other state or federal statutes.

6. Plaintiff's allegations do not state a cause of action arising under either the Washington or the United States Constitutions.

7. Most of the actions or inactions alleged by plaintiffs fall within the broad discretionary authority of the Seattle School District, its administrators, and its certificated staff, all of whom are public officers.

8. The court is not equipped to oversee and monitor day-to-day operations of a public school system.

9. None of plaintiffs' allegations of fraud, conspiracy, improprieties,, wasting of funds, lack of discipline, or lack of due process rises to an actionable valid cause of action which can be brought by a private individual.

10. To the extent that plaintiffs' allegations do state valid complaints against the Seattle School District or its administrators or certified staff, litigation of such complaints is barred by the 30-day limitations period set forth in RCW 28A.88.010.

11. A number of the plaintiffs' allegations and claims are frivolous.

12. Plaintiffs' second amended complaint, seeking to add Jewell Woods as a defendant, is frivolous on its face.

13. Plaintiffs have not made personal service of original process in the manner required by Civil Rule 4 and applicable state statutes on any of the individual defendants except Kenneth Dorsett, Michael Hoge, William Kendrick, Chris Kato, David Stevens, Jewell Woods and Elizabeth Wales.

14. There are no genuine issues of material fact remaining for trial.

NOW THEREFORE, on the basis of the foregoing findings and conclusions,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows;

1. Defendants' motion for dismissal is granted;

2. Defendants' motion for summary judgment is granted;

3. Defendants' motion for dismissal of claims against individual defendants is granted against all individual defendants for the reason that the allegations against the individual defendants are based on exercise of discretion by said defendants.

4. Defendants' motion for dismissal of claims against individual defendants is granted as to all defendants except Kenneth Dorsett, Michael Hoge, William Kendrick, Chris Kato, David Stevens,, Jewell Woods,, and Elizabeth Wales for the reason that all except these seven listed defendants have not been personally served with original process.

5. Defendants' motion to dismiss claims of fraud and conspiracy is granted and all plaintiffs' claims of fraud and conspiracy are hereby stricken and dismissed; provide that, the court shall retain jurisdiction for thirty (30) days from the date of this order to provide plaintiffs with the requisite particularity, if plaintiffs wish to attempt to do so.

6. Defendants' motion for attorneys' fees and terms based on frivolous claims is granted.

7. Defendants shall recover from plaintiffs the sum of $250.00 for terms and attorneys' fees and $125.00 for taxable costs, for a total judgment against plaintiffs and in favor of defendants in the amount of $375.00.

8. The clerk of the court is directed to enter judgment in favor of defendants in this matter consistent with the above orders.

DONE IN OPEN COURT this 15th day of December, 1986.

Signed by Gerard N. Shellan, Judge

Prepared by Lawrence B. Ransom, Attorney for defendant.

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

Dorothy Camer, or herself and Miki Camer; Kirk Camer; and Pepi Camer, Plaintiffs v. Seattle School District No.1 et al., Defendants
No. 86-2-11966-3

ORDER OF DISMISSAL AND
SUMMARY JUDGMENT
REGARDING FRAUD AND CONSPIRACY CLAIMS

THIS MATTER, having come on for hearing before the undersigned Judge Gerard M. Shellan on March 18, 1987, on motion of defendant Seattle School District No. 1 and other served defendants for dismissal or summary judgment on plaintiffs' claims of fraud and conspiracy; defendants having been represented at the hearing on said motions by Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax, P.S. and Lawrence B. Ransom, their attorneys; plaintiffs appearing at said hearing through plaintiff Dorothy Camer, pro se; the court having heard the arguments of counsel and the pro se plaintiff and the court having reviewed and considered the following:

1. Defendants Motion for Dismissal or Summary Judgment on Plaintiffs' Claims of Fraud and Conspiracy;

2. Plaintiffs' statement of Particularities of Fraud, filed on January 14, 1987, including all attachments thereto;

3. All of the materials that were considered by the court as referenced in the court's Order of Dismissal and Summary Judgment dated December 15, 1986; and

4. All other papers properly filed by any party to these proceedings;

and the court being otherwise fully advised;

NOW THEREFORE, the court does reach the following Conclusions:

1. There are no genuine issues of material fact regarding plaintiffs' claims based on allegations of fraud and conspiracy;

2. Defendants are entitled to judgment as a matter of law on all of plaintiffs' claims based on allegations of fraud and conspiracy.

NOW THEREFORE, on the basis of the foregoing conclusions, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Defendants' Motion for Dismissal or Summary Judgment on Plaintiffs' Claims of Fraud and Conspiracy is granted;

2. Defendants shall not be entitled to any further affirmative relief at the trial court level, including costs and attorneys' fees, other than as set forth in the court's Order of Dismissal and Summary Judgment dated December 15, 1986;

3. Combining this Order with the court's Order of Dismissal and Summary Judgment dated December 15, 1986, all of the plaintiffs claims against all defendants are now, finally, dismissed with prejudice.

DONE IN OPEN COURT this 18th day of March, 1987.

Signed: Gerard M. Shellan, Judge

Prepared by: Lawrence B. Ransom, Attorney for the Defendants

APPENDIX C

DECISION OF THE COURT OF APPEALS, DIVISION I, STATE OF WASHINGTON

Dorothy Camer, for herself and Kirk Camer and Pepi Camer, Appellants v. Frank Brouillet et al., Respondents

No. 10227-3-I, Unpublished
Filed June 7, 1982

CORBETT, J. -- Dorothy Camer, individually and as a parent and guardian, appeals a summary judgment that dismissed her complaint seeking damages for the alleged denial of a basic education for her children.

The complaint alleges that in June of 1979, Kirk completed the 6th grade and Pepi completed the 5th grade at Jefferson School in the Seattle School District. Their report cards indicated satisfactory or better work. However, both children failed to achieve certain student learning bench marks for their grade level due to an alleged failure by the school district to provide adequate instruction. Plaintiff further alleges that the school staff failed to provide a healthy environment conducive to education and to provide a program to meet the individual and collective needs of plaintiff's children and their fellow students. She concludes with the allegation that because the Seattle School District failed to properly implement the STudent Learning Objective law, RCW 28A.58.090 and .092, and the Basic Education Act, RCW 28A.58.750, plaintiff's children were not provided with a constitutionally guaranteed basic program of education, as required by article 9, section 1 of our state constitution. In support of her complaint, plaintiff submits a long record of correspondence as evidence of her attempts to bring alleged instructional deficiencies to the attention of the defendants. Her most specific objections were (1) a disciplinary measure that separated boys and

girls at recess, (2) a school practice of not obtaining excuses from parents for absences and tardiness, and (3) failure of her children to meet "bench mark" learning objectives. The trial court found that there was not issue of material fact,, and that the complaint failed to state a claim upon which relief could be granted.

Plaintiff contends that she has a right to seek interpretation of the Basic Education Act and the Student Learning Objectives law under the Uniform Declaratory Judgment Act. RCW 7.24. In her complaint, she prays for declaratory relief affirming the right of all students to a basic education and equal opportunity to receive all the services of the school district. These rights are provided for by article 9 of our state constitution and are not disputed by the defendants. Before the court's declaratory judgment power can be invoked, there must be a justiciable controversy. Port of Seattle v. State Utilities & Transportation Comm'n., 92 Wn.2d 789, 806, 597 P.2d 383 (1979). This requires:

> (1)...an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Diversified Industrial Development Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973). The statutory purpose of the act and the indication that it should be liberally construed does not make the issuance of a declaratory judgment mandatory. The granting of a declaratory judgment is discretionary. King County v. Boeing, 18 Wn.App. 595, 601-02, 570 P.2d 713 (1977). The trial court did not abuse its discretion by refusing to grant

the requested decree in the absence of a justiciable controversy.

Plaintiff next contends that she has standing to bring a private cause of action under the Student Learning Objectives law. The statute does not expressly provide for a private remedy. She relies on Cort v. Ash, 422 U.S. 66, 78, 45 L.Ed.2d 26, 95 S.Ct. 2080 (1975) as authority for an implied remedy. The relevant factors as set out in the Cort decision are: (1) Is the plaintiff one of the class for whose especial benefit the stature was enacted? (2) Is there any indication of legislative intent to create or deny such a remedy? (3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy? Id. at 78. Examination of the Senate and House Journals relative to the legislation in question discloses no clear legislative intent to create a duty enforceable in tort flowing from the Seattle School District or the Superintendent of Public Instruction to individual pupils or their parents.

> The traditional rule is that a regulatory statute imposes a duty on public officials which is owed to the public as a whole, and that such a statute does not impose any duties owed to a particular individual which can be the basis for a tort claim.

Baerlein v. State, 92 Wn.2d 229, 231, 595 P.2d 930 (1979), citing Halvorson v. Dahl, 89 Wn.2d 673, 574 P.2d 1190 (1978). The purpose of the Student Learning Objectives so as to provide (a) economies in management and operation and quality education, and (b) a measurable guide by which to gauge actual student attainment. Assuming only for argument that plaintiff's children, by virtue of their status as students, fall within a particular and circumscribed class of persons to be benefited by the statute, the language and legislative history of the statute are devoid of any intention on the part of the legislature to create a private cause of action for damages. Therefore, the court need not inquire further as to whether such a

right exists. Touche Ross & Co. v. Redington, 442 U.S. 560,, 576, 61 L.Ed.2d 82, 99 S.Ct. 2479 (1979); California v. Sierra Club, __ U.S. __, 68 L.Ed.2d. 101, 110, 101 S.Ct. __ (1981). The plaintiff has failed to submit any state of facts which, by statute or constitutional provision, would entitle her to relief. The trial court did not err in so finding.

Plaintiff further contends that she has standing to seek judicial relief under the traditional concepts of tort. There are three elements of actionable neglience: (1) existence of a duty, (2) breach thereof, and (3) damages proximately caused thereby. Lewis v. Scott, 54 Wn.2d 851, 341 P.2d 488 (1959). Existence of a duty is a question of law and not of fact. Bayman v. Clearwater Power Co., 15 Wn.App. 566, 568, 550 P.2d 554 (1976). Interpretation of the statutes relied upon by the plaintiff is also a question of law for the court. State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 777, 380 P.2d 735 (1963); Hearst Corp. v. Hoppe, 90 Wn.2d 123, 130, 580 P.2d 246 (1978); McFadden v. Elma County Club, 26 Wn.App. 195, 203, 613 P.2d 146 (1980).

The plaintiff's cause of action sounds in "educational malpractice," an issue of first impression in this state. The defendants cite cases from other jurisdictions that have considered the issue and have declined to recognize an actionable "duty of care" in persons and agencies who administer the public educational process. See Peter W. v. San Francisco Unified Sch. Dist., 131 Cal Rptr. 854, 860, 60 Cal.App.3d 823 (1976); Donohue v. Copiague U. Free Sch. Dist., 407 N.Y.S.2d 874, 878,, 64 A.2d 29 (1978), aff'd, 418 N.Y.S.2d 375 (1979). We do not find it necessary to decide if such an action exists in the State of Washington until a more appropriate case is presented to us. The plaintiff has failed to establish a breach of duty on the part of the defendants. The Seattle School District's duty to educate under the Basic Education Act and to make achievement reports under the Student Learning Objective statute does not include a duty to insure that every student, including the children of the plaintiff, will be able to achieve every

bench mark. The action was properly dismissed by the trial court for failure to state facts giving rise to a cause of action.

Affirmed.

T. Patrick Corbett, J.

We Concur: Herbert Swanson, Ward Williams

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, IT IS SO ORDERED.

Chief Judge

C-6

UNITED STATES COURT OF APPEALS,

FOR THE NINTH CIRCUIT

Kirk Camer, minor, and Dorothy Camer, parent and guardian, Plaintiffs-Appellants, v. Ken O. Eikenberry, et al., Defendants-Respondents

No. 81-3587

MEMORANDUM (DO NOT PUBLISH)

Decided February 16, 1983

Before: Duniway, Fletcher and Ferguson, Circuit Judges.

Dismissal of this action, involving a high school math honors program and an eighth grade social studies course, is justified if plaintiffs' claims were "so attenuated and unsubstantial as to be absolutely devoid of merit, . . .," Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904), or "frivolous," Bell v. Hood, 327 U.S. 678, 683 (1946); Baker v. Carr, 369 U.S. 186, 199 (1962). The district court properly dismissed that action.

Plaintiff Dorothy Camer does not claim that her son was treated differently from other students in his classes, school, or school district or that he was denied an education on the basis of a suspect classification. Therefore the equal protection claim is unsubstantiated.

The plaintiffs' due process claims are also unsubstantial. There is no property interest, protect by due process, in being notified of every educational offering the state makes available to those who ask or in receiving a given level of instruction. Due process protects only those entitlements which the state has established and maintained. See Goss v. Lopez, 419 U.S. 565, 574 (1975) (due process protects entitlement to public education).

Furthermore, no claim presented arises under federal statutes. These claims will lie, if at all, only in state court, where proceedings are being held. Dismissal was therefore proper. Gully v. First National Bank, 299 U.S. 109 (1936).

AFFIRMED.

APPENDIX D

WASHINGTON CONSTITUTION AND LAWS

CONSTITUTION ARTICLE IX

Section 1 PREAMBLE. It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

Section 2 PUBLIC SCHOOL SYSTEM. The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.

REVISED CODE OF WASHINGTON

28A.02.080 STUDY OF THE CONSTITUTIONS COMPULSORY-REGULATIONS TO IMPLEMENT. The study of the Constitution of the United States and the Constitution of the state of Washington shall be a condition prerequisite to graduation from the public and private high schools of this state. The state board of education acting upon the advice of the superintendent of public instruction shall provide by rule or regulation for the implementation of this section.

28A.05.010 COMMON SCHOOL CURRICULUM-FUNDAMENTALS IN CONDUCT. All common schools shall give instruction in reading, penmanship, orthography, written and mental arithmetic, geography,, English grammar, physiology and hygiene with special reference to the effects of alcoholic stimulants and narcotics on the

human system, the history of the United States, and such other studies as may be prescribed by rule or regulation of the state board of education. All teachers shall stress the importance of the cultivation of manners, the fundamental principles of honesty, honor, industry and economy, the minimum requisites for good health including the beneficial effect of physical exercise, and the worth of kindness to all living creatures.

28A.05.050 HISTORY AND GOVERNMENT IN HIGH SCHOOLS. To promote good citizenship and a greater interest in and better understanding of our national and state institutions and system of government, the state board of education shall prescribe a one-year course of study in the history and government of the United States, and the equivalent of a one-semester course of study in the state of Washington's history and government. No person shall be graduated from high school without completing such courses of study: Provided That students in the twelfth grade who have not completed such a course of study in Washington's history and state government because of previous residence outside of the state may have the foregoing requirement waived by their principal.

28A.27.010 ATTENDANCE MANDATORY - AGE - PERSONS HAVING CUSTODY SHALL CAUSE CHILD TO ATTEND PUBLIC SCHOOL - CHILD RESPONSIBLE FOR ATTENDING SCHOOL - EXCEPTIONS-EXCUSED TEMPORARY ABSENCES (1) All parents in this state of any child eight years of age and under eighteen years of age shall cause such child to attend the public school of the district in which the child resides and such child shall have the responsibility to and therefore shall attend for the full time when such school may be in session. . . .

28A.27.020 SCHOOL'S DUTIES UPON JUVENILE'S FAILURE TO ATTEND SCHOOL - GENERALLY If a juvenile required to attend school

under the laws of the state of Washington fails to attend school without valid justification recurrently or for any extended period of time, the juvenile's school, where appropriate shall:
(1) Inform the juvenile's custodial parent,, parents or guardian by a notice in writing in English and, if different, in the primary language of the custodial parent, parents or guardian and by other means reasonably necessary to achieve notice of the fact that the juvenile has failed to attend school without valid justification recurrently or for an extended period of time;
(2) Schedule a conference or conferences with the custodial parent, parents or guardian and juvenile at a time and place reasonably convenient for all persons included for the purpose of analyzing the causes of the juvenile's absences; and
(3) Take steps to eliminate or reduce the juveniles's absences. These steps shall include, where appropriate, adjusting the juvenile's school program or school or course assignment, providing more individualized or remedial instruction,, preparing the juvenile for employment with specific vocational courses or work experience, or both, and assisting the parent or student to obtain supplementary services that might eliminate or ameliorate the cause or causes for the absences from school.

28A.58.090 STUDENT LEARNING OBJECTIVES - PROGRAM IDENTIFYING AND ESTABLISHING, SCOPE-REVIEW AND REPORTS. Every school district board of directors, being accountable to the citizens within its district as to the education offered to the students therein, shall, based on the timeline established by the superintendent of public instruction, develop a program identifying student learning objectives for their district in all courses of study included int he school district programs. The school district must evidence community participation in defining the objectives of such a program. The program of student learning objectives shall assure that the district's resources in the educational program, such as money, facili-

ties, time, materials and personnel, are used so as to provide both economies in management and operation, and quality education in all subject areas and courses. The learning objectives shall be measurable as to the actual student attainment; student attainment shall be locally assessed annually and the student learning objectives program shall be reviewed at least every two years in developing and reviewing the learning objectives, districts shall give specific attention to improving the depth of course content within courses and in coordinating the sequence in which subject matter is presented...

28A.58.101 GOVERNMENT OF SCHOOLS, PUPILS, EMPLOYEES, RULES AND REGULATIONS FOR-DUE PROCESS GUARANTEES ENFORCEMENT. Every board of directors unless otherwise specifically provided by law, shall:

(1) Enforce the rules and regulations prescribed by the superintendent of public instruction and the state board of education for the government of schools, pupils and certificated employees.

(2) Adopt and make available to each pupil, teacher, and parent in the district reasonable written rules and regulations regarding pupil conduct, discipline, and rights, including but not limited to short-term and long-term suspensions. Such rules and regulations shall not be inconsistent with law or the rules and regulations of the superintendent of public instruction or the state board of education and shall include such substantive and procedural due process guarantees as prescribed by the state board of education under RCW 28A.04.132. Commencing with the 1976-77 school year, when such rules and regulations are made available to each pupil, teacher and parent, they shall be accompanied by a detailed description of the rights, responsibilities and authority of teachers and principals with respect to the discipline of pupils as prescribed by state statutory law, superintendent of public instruction and state board of education rules and regulations and rules and regulations of the school district.

For the purposes of this subsection, computation of days included in "short-term" and "long-term" suspensions shall be determined on the basis of consecutive school days.

(3) Suspend, expel, or discipline pupils in accordance with RCW 28A.04.132.

28A.58.750 BASIC EDUCATION ACT OF 1977 - PROGRAM CONTENTS-AS MEETING CONSTITUTIONAL REQUIREMENTS. This 1977 amendatory act shall be known and may be cited as "The Washington Basic Education Act of 1977". The program evolving from the Basic Education Act shall include (1) the goal of the school system as defined in RCW 28A.58.752, (2) those program requirements enumerated in RCW 28A.58.754, and (3) the determination and distribution of state resources as defined in RCW 28A.41.130 and 28A.41.140.

The requirements of the Basic Education Act are deemed by the legislature to comply with the requirements of Article IX, section 1 of the state Constitution, which states that "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex", and are adopted pursuant to Article IX, section 2 of the state Constitution, which states that "The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools."

28A.58.752 BASIC EDUCATION ACT OF 1977 - GOAL. The goal of the Basic Education Act for the schools of the state of Washington set forth in this 1977 amendatory act shall be to provide students with the

opportunity to achieve those skills which are generally recognized as requisite to learning. Those skills shall include the ability:
(1) To distinguish, interpret and make use of words, numbers and other symbols. including sound, colors, shapes and textures;
(2) To organize words and other symbols into acceptable verbal and nonverbal forms of expression, and numbers into their appropriate functions;
(3) To perform intellectual functions such as problem solving, decision making, goal setting, selecting, planning, predicting, experimenting, ordering and evaluating; and
(4) To use various muscles necessary for coordinating physical and mental functions.

28A.58.754** BASIC EDUCATION ACT OF 1977 - DEFINITIONS-PROGRAM REQUIREMENTS-PROGRAM ACCESSIBILITY-RULES AND REGULATIONS.
(1) for the purposes of this section . . .
(a) The term "total program hour offering" shall mean those hours when students are provided the opportunity to engage in educational activity planned by and under the direction of school district staff, as directed by the administration and board of directors of the district. . .
(d) Each school district shall make available to students in grades seven through eight, at least a total program hour offering of one thousand nine hundred eighty hours. A minimum of eighty-five percent of the total program hour offerings shall be in the basic skills areas of reading/language arts (which may include foreign languages), mathematics, social studies, science, music, art, health and physical education. A minimum of ten percent of the total program offerings shall be in the area of work skills, The remaining five percent of the total program hour offerings

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*Laws thus marked have been excerpted to minimize the volume of reproduction.

may include such subjects and activities as the school district shall determine to be appropriate for the education of the school district's students in such grades;
(3) Each school district shall make available to students in grades nine through twelve at least a total program hour offering of four thousand three hundred twenty hours. . .
(5) Each school district's kindergarten through twelfth grade basic educaton program shall be accessible to all students who are five years of age, as provided by RCW 28A.58.190, and less than twenty-one years of age and shall consist of a minimum of one hundred eighty school days per school year in such grades as are conducted by the school district, and one hundred eighty half-days of instruction, or equivalent, in kindergarten. . .

28A.58.758* BASIC EDUCATION ACT OF 1977 - DISTRICT SCHOOL DIRECTORS AS ACCOUNTABLE FOR PROPER OPERATION OF DISTRICT-SCOPE-RESPONSIBILITIES-PUBLICATION OF GUIDE.
(1) It is the intent and purpose of this section to guarantee that each common school district board of directors, whether or not acting through its respective administrative staff, be held accountable for the proper operation of their district to the local community and its electorate. In accordance with the provisions of Title 28A RCW, as now or hereafter amended, each common school district board of directors shall be vested with the final responsibility for the setting of policies ensuring quality in the content and extent of its educational program and that such program provide students with the opportunity to achieve those skills which are generally recognized as requisite to learning.
(2) In conformance with the provisions of Title 28A RCW, as now or hereafter amended, it shall be the responsibility of each common school district board of directors, acting through its respective administrative staff, to:
(a) Establish performance criteria and an evaluation process for its certificated personnel, including administrative

staff, and for all programs constituting a part of such district's curriculum. . . .
(c) Determine the amount of instructional hours necessary for any student to acquire a quality education in such district, in not less than an amount otherwise required in RCW 28A.58.754, or rules and regulations of the state board of education. . . .
(e) Establish final curriculum standards consistent with law and rules and regulations of the state board of education, relevant to the particular needs of district students or the unusual characteristics of the district, and ensuring a quality education for each student in the district. . .
(3) In keeping with the accountability purpose expressed in this section and to insure that the local community and electorate have access to information on the educational programs in the school districts, each school district's board of directors shall annually publish a descriptive guide to the district's common schools. This guide shall be made available at each school in the district for examination by the public. The guide shall include, but not be limited to, the following: . . .
(b) A summary of program objectives pursuant to RCW 28A.58.090

28A.58.760* BASIC EDUCATION ACT OF 1977 - CERTIFICATED TEACHING AND ADMINISTRATIVE STAFF AS ACCOUNTABLE FOR CLASSROOM TEACHING - SCOPE - RESPONSIBILITIES - PENALTY.
(1) It is the intended purpose of this section to guarantee that the certificated teaching and administrative staff in each common school district be held accountable for the proper and efficient conduct of classroom teaching in their school which will provide students with the opportunity to achieve those skills which are generally recognized as requisite to learning.
(2) In conformance with the other provisions of Title 28A RCW, it shall be the responsibility of the certificated

teaching and administrative staff in each common school to:

(a) Implement the district's prescribed curriculum and enforce, within their area of responsibility, the rules and regulations of the school district, the state superintendent of public instruction, and the state board of education, taking into due consideration individual differences among students, and maintain and render appropriate records and reports pertaining thereto. . . .

(d) Require excuses from the parents, guardians, or custodians of minor students in all cases of absence, late arrival to school, or early dismissal.

(e) Give careful attention to the maintenance of a healthful atmosphere in the classroom.

(g) Evaluate each student's educational growth and development and make periodic reports thereon to parents, guardians, or custodians and to school administrators.

Failure to carry out such requirements as set forth in subsection (2)(a) through (g) above shall constitute sufficient cause for discharge of any member of such teaching and administrative staff.